JD(NY)–18–09
Hartford, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEMS, INC.
Employer

And **34-RC-2205**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 671
Petitioner

Richard Hughes, Esq., John Ferrer, Esq. and *Doreen Davis, Esq., Morgan, Lewis & Bockius, LLP*, for the Employer.
Gabriel Dumont, Esq., Dumont, Morris & Burke, P.C., for the Petitioner.
Rick Concepcion, Esq., Counsel for the Regional Director.

SUPPLEMENTAL DECISION ON OBJECTIONS

Joel P. Biblowitz, Administrative Law Judge: This hearing took place in Hartford, Connecticut on January 20, 2009 and April 13, 2009, and in Boston, Massachusetts on March 13, 2009 pursuant to a Decision and Order Remanding issued by the Board on September 29, 2008. By Decision and Direction of Election (DDE) dated April 11, 2007, the Regional Director for Region 34 found that the Employer was an employer within the meaning of the Act, that it would effectuate the purposes of the Act to assert jurisdiction, and rejected the Employer's argument that the petitioned for contract-drivers were independent contractors within the meaning of Section 2(3) of the Act and found, rather, that they were employees within the meaning of the Act. The Decision also found that Robert Dizinno shared a community of interest with the other contract drivers, and that the Employer failed to satisfy its burden that Paul Chiappa was a supervisor within the meaning of Section 2(11) of the Act.

At a secret ballot election conducted on May 11, 2007, the ballots were impounded because the Employer filed a Request for Review of the April 11, 2007 DDE. The Board denied the Employer's Request for Review by Order dated May 22, 2007 and the tally of ballots took place at the Board's regional office on June 1, 2007, with the result that 12 votes were cast for the Petitioner, 9 votes were cast against the Petitioner, and as there were 2 challenged ballots, challenges were not determinative. On June 8, 2007 the Employer filed the following Objections to Election on June 8, 2007:

> 1. During the critical period before the representation election on May 11, 2007, Teamster Union Local 671, Affiliated with IBT ("Union"), by and through its agents and others with whom it acted in concert, improperly conferred valuable benefits, including legal services, to eligible voters and caused two civil actions on their behalf to commence in the U.S. District Court for the District of Connecticut. The civil actions identify six (6) voters as named plaintiffs. The Union's conduct constitutes, among other things, an impermissible benefit that interfered with laboratory conditions necessary to conduct a free and fair election.
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> 2. At the election, the Company challenged the ballots cast by Paul Chiappa and Robert Dizinno, including for the reason that certain circumstances had changed since the time

> when the petition was filed. Before the Region counted the ballots, the Company notified the Board Agent that it maintained its challenge to the ballots of Chiappa and Dizinno for the reasons stated previously, and it objected to the Region opening and commingling their ballots without first (1) counting the unchallenged ballots to determine whether all challenged ballots were outcome determinative and (2) if so, giving the Company an opportunity to present evidence in support of its challenges, conducting an investigation, and then making a determination as to Chiappa's and Dizinno's eligibility. Over the Company's objection, the Board Agent opened and counted the challenged ballots of Chiappa and Dizinno; however, he did not open and count the other two challenged ballots (one by the Union and one by the Company). The count yielded 12 votes for the Union and 9 votes for no union. The Board Agent's conduct in prematurely opening and counting challenged ballots was improper.
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> The Union and Board Agent's conduct was improper and affected the outcome of the election, which turned on three votes (two of which should not have been counted without an investigation). For these reasons and the additional reasons that the Region and the Company might discover, the Company requests that the results of the election in the above-captioned matter be set aside.

In my Decision on Objections, I recommended that the Employer's objections be overruled and that the Regional Director issue an appropriate certification. The Board's Decision and Order Remanding found that I erred in failing to admit and consider certain evidence that is necessary and relevant in determining the merits of each objection.

Objection No.1

In my Decision on Objections, I found that the Union did not initiate or pay any part of the legal fees of the lawsuit brought by the unit employees against the Employer and therefore the Union did not confer any valuable benefits to the employees, as alleged in Objection 1, and I therefore recommended that the objection be overruled. In its Order Remanding, the Board stated, *inter alia*:

> By limiting the evidence here solely to the question of whether the Union directly financed the Connecticut lawsuits, the judge failed to develop a complete record on the objectionable benefits issue, i.e., did the Petitioner arrange or take credit for the provision of free legal services for unit employees contingent on a favorable outcome for the Petitioner in the election or, for that matter, on individual plaintiffs' votes for the Petitioner?

The Board remanded the case to me to "reopen the record to admit additional evidence and make appropriate findings concerning the Petitioner's involvement in the arrangement of legal services and what its agents said to unit employees about those services."

Pursuant to the Remand, unit and non-unit employees testified, as did Union representatives and lawyers involved in the employees' lawsuits against the Employer. I should initially note that the witnesses in this supplemental hearing about Objection No. 1 were "reluctant witnesses" and, in some cases, more hostile than that. They had all been subpoenaed to testify by the Employer and were either plaintiffs in lawsuits against the Employer, union representatives involved in organizing the Employer's employees, or counsel in the lawsuits against the Employer. Not surprisingly, their displeasure at being subpoenaed and testifying as witnesses for the Employer was clearly evident. Although they clearly did not go out of their way to strengthen the Employer's case, I find no other evidence, or reason, to discredit their

testimony. I also decline to find an adverse inference against the Petitioner, as argued by counsel for the Employer in its brief.

William Gardner, who is employed by the Employer at its Boston facility, and is a union steward for Teamsters, Local 25, attempted to assist the Petitioner in its organizing drive at the request of Steve Sullivan, the Local 25 Director of Organizing. In this regard, he attended a meeting that the Petitioner conducted on February 25, 2007 at its union hall. He testified that about five unit drivers were present at the meeting and he made the drivers "aware" of the lawsuit against the Employer. After the meeting, Gardner sent an e-mail to Anthony Lepore, president and organizer for the Petitioner, saying that he had spoken to their class action attorney, presumably attorney Maydad Cohen, saying that the attorneys would like to speak by telephone to any driver who would be interested in becoming plaintiffs in the lawsuit. Gardner also attended the Petitioner's meeting just prior to the election. Between eight and fifteen unit drivers attended this meeting, but he did not speak at this meeting and cannot recall any discussion of the lawsuit at this meeting. Shortly thereafter, Sullivan sent an e-mail to Gardner asking him to call twelve unit employees. Pursuant to that request, he spoke to at least two of the drivers, told them that at the election for the Boston unit the Employer tried to intimidate the employees, that they should stick together, and asked if they had any questions. He does not recall any discussion of the lawsuit against the Employer in any of these telephone conversations.

Lepore testified that drivers and union representatives from the Boston unit attended two of the Petitioner's pre-election meetings, but he does not recall any discussion about the private lawsuit. Sullivan testified that Lepore asked him to have some of the Boston unit drivers contact the Hartford unit drivers shortly prior to the election, and Sullivan asked Gardner and Wayne and Cathy Curran to call some of the voters to tell them that it was okay to vote for the Union. He also e-mailed Gardner and asked him to attend the meeting conducted by the Petitioner prior to the election. Sullivan testified further that Local 25 paid Gardner on three occasions after the election covering the Boston unit of the Employer. These payments were made to Gardner in 2006 and 2007 because he spent a lot of time assisting him in organizing the Boston unit, and in defending the objections to the election that were filed by the Employer in that election. Sullivan was asked:

> Judge Biblowitz: Did that have any connection at all with the Hartford election?
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> The Witness: Absolutely not.

Local 25 paid Gardner wages of $524 in 2007. He had no recollection of when he received this money or for what period the wages were meant to cover. He received this money because: "I made myself available to the Teamsters" during that period and assisted the Teamsters in area organizing drives involving the Employer and "I basically was available for anything that they needed."

Chiappa testified that he attended the Petitioner's meeting on February 25, 2007. Lepore and Lucas attended for the Petitioner, but he was not certain whether Gardner, Welker or Sullivan attended. Lepore and Lucas spoke at this meeting, saying that they were trying to get the Teamsters elected and get a contract covering the Hartford drivers. He does not recall the lawsuits involving the Employer being discussed. At the next meeting on March 25, he, Dizinno, Lepore, Lucas and some other unit drivers were in attendance; he does not recall whether Gardner, Welker or Sullivan attended this meeting, and does not recall any discussion regarding the Fedex lawsuit. Lepore and Lucas spoke about the upcoming election and the hope that the employees would be covered by a contract with the Employer. On April 16, 2007 Chiappa

signed a retainer agreement with the Pyle Rome law firm, and the Hayber and Pantuso law firms. He believes that he signed it at the Hayber office together with Dizinno, and fellow employees Dave Trojanowski, Neville Edwards and Thomas Magno. Gardner, Sullivan, Lucas and Lepore were not there. He learned about Hayber and Pantuso from Dizinno. The upcoming Board election was not discussed at that meeting, and he cannot recall any communications from either of these law firms between that meeting and the election. He attended the final Union meeting prior to the election. Gardner, Sullivan and a few other Boston unit drivers were present at this meeting. Gardner did not talk about the Fedex lawsuit; all he said was that the Boston drivers had already elected the Teamsters as their bargaining representative. Edwards testified that he signed his retainer on the same day as Chiappa with the same individuals present and that he also learned about the Hayber law firm from Dizinno. Ignasiak signed his retainer agreement on March 16, 2007 with Chiappa, Dizinno, Edwards, Trojanowski, Magno and Anderson present, together with attorney Hayber and an attorney from Pyle Rome. The Board election was not discussed at this meeting, and none of the union representatives were present at the meeting. Trojanowski testified that he attended four or five union meetings prior to the election, but cannot remember the dates of the meetings. He does not remember any of the Boston drivers speaking at any of these meetings and does not know Gardner. Welker attended one or more than one meeting, but he does not remember anything that Welker said at these meetings. He signed the retainer agreement together with the other unit employees at the Hayber law firm on April 16, 2007. There were no discussions of the election at this meeting.

David Welker, had been employed by the International Brotherhood of Teamsters for three years until January 2009 as senior strategic research and campaign coordinator. In that capacity, he coordinated Teamster organizing campaigns, assisted local unions in organizing campaigns, and was in charge of the Fedex project, which was intended to publicize the Employer's operation and the MDL (Multi-District Litigation) lawsuits against Fedex. A principal aim of the Fedex Project was to publicize what the Union considered the unfairness of the Employer's labor relations policies, especially to its drivers. He testified to some limited contact with the lawyers representing the drivers in the MDL lawsuit in 2006, prior to any of the Hartford drivers joining the lawsuit, and he spoke with Maydad Cohen, an attorney involved in the lawsuit, at the initial hearing on Objections in July 2007. He prepared and distributed campaign material to the local unions to be distributed to the drivers to notify them about the lawsuits in order to encourage them to contact the attorneys handling the lawsuits. He was questioned extensively about his participation in this program and the information and e-mails that he transmitted to Local 671 and Local 25, in particular. Letters and leaflets were sent to the Petitioner as well as other Teamster local unions in 2006 and 2007. These unions were asked to distribute the leaflets and to participate in the union's "Don't sit out the fight campaign" that was directed at the Employer. An essential part of the letters and distributions was to notify the members (especially those who were employed by the Employer) of the website maintained to keep the employees notified about the lawsuits maintained against the Employer. One of the leaflets distributed to the local unions in May 2006 states, *inter alia:* "The drivers' lawsuit will end the talk and force action on truck payments, benefits, overtime and work rules. The law is clear and strong. The law is on the drivers' side. Contact the lawyers. Add your voice." On July 25, 2006, the International wrote a letter to the Petitioner stating, *inter alia*: "I'd like to ask for your participation in the next stage in our campaign to support the drivers at FedEx Ground/Home Delivery. The drivers' legal fight to end the 'contractor' classification at FedEx is reaching a critical stage. The more drivers that step forward to join in the legal fight will mean a better chance of victory in the courts."

Welker spoke at the Petitioner's meeting in December 2006 and gave the employees information about the MDL lawsuit, including a one-page handout regarding the plaintiffs' lawyers and the website referencing the lawsuit. At the February and May 2007 meetings, he

discussed developments in the lawsuit and told them to go to the website to obtain more information. He also said that the union was not a party to the lawsuit and was not involved in funding or directing the lawsuit. On June 4, 2007, Welker sent an e-mail to Gardner entitled: "BIG WIN", stating: "Definitely a big step forward. CT guys did what they said they'd do- win the election, file claims with the state govt and join the MDL…" He testified that Dizinno was the only unit employee with whom he could remember directly discussing the lawsuit. Dizinno told him that he wanted to pursue the lawsuit and Welker told him that it was up to him. In addition, at the May 7, 2007 meeting, Lepore told him that there was a positive reaction among the drivers to the lawsuit.

As stated above, most of the unit employees who agreed to participate in the lawsuit against the Employer executed retainer agreements on about April 17, 2007; the resulting lawsuit was filed on May 22, 2007. Attorney Maydad Cohen testified that sometime after the Petitioner's February meeting attended by Gardner, he received telephone calls from Dizinno, Chiappa and two or three other unit employees asking about the lawsuit. He does not know whether they got his name and telephone number from Gardner, from the lawsuit website, or from some other source. He obtained their employment information and their employment status and told them of the existence of the Massachusetts lawsuit as well as the MDL lawsuit. He also attended a meeting at Attorney Hayber's office with Dizinno, Chiappa and other unit employees where retainer agreements were either discussed or signed.

Amidst all of this testimony about union meetings, meetings between lawyers and the unit drivers, and e-mails and literature that Welker sent to the local unions in support of its campaign against the Employer, it is important to focus on the specific issue that the Board remanded to me: "did the Petitioner arrange or take credit for the provision of free legal services for unit employees contingent on a favorable outcome for the Petitioner in the election or, for that matter, on individual plaintiffs' votes for the Petitioner?" [Emphasis added] As to the first part of this Order, there is no evidence that the Petitioner arranged, or took credit, for the free legal services. The unit employees knew that the lawyers involved in the cases were handling the lawsuits on a complete contingent fee basis without any involvement of the Petitioner. The sole evidence in this regard is that both Welker and Gardner publicized (at the Petitioner's meetings and on the union websites) and made the unit employees aware of the lawsuits, and even encouraged them to contact the lawyers handling the lawsuit. However, even if the evidence had established that the Petitioner arranged for, or took credit for, the free legal services, the Board remand also required that the provision of free legal services was contingent on a union victory in the election or individual employee votes, and there was not a scintilla of evidence of that. I find no merit to this objection, and I therefore recommend that Objection No. 1 be overruled.

Objection No. 2

In my Decision, I recommended that Objection 2 be overruled, finding that the Employer did not satisfy its burden of establishing a change of circumstances in the job responsibilities for employees Paul Chiappa and Robert Dizinno from the close of the hearing to the date of the election on May 11, 2007, and that the region properly opened and counted their ballots on June 1, 2007. The Board, however, found that the Board agent erred by commingling the ballots cast by Chiappa and Dizinno prior to any consideration of the merits of the Employer's claim that changed circumstances justified the challenge to those ballots and remanded the hearing to me to take evidence and make appropriate findings as to whether the challenges to these ballots would have been sustained based upon changed job circumstances of Chiappa and Dizinno and if so, whether the Board agent's error affected the election.

David Durette, who is employed by the Employer as a senior manager at its Manchester, New Hampshire terminal, and Ray Finch, who is employed by the Employer as senior manager, contractor relations for the northeast and New England areas, testified for the Employer regarding Objection No. 2. Durette, whose jurisdiction includes the Hartford terminal involved herein, testified that in early February 2007, prior to the representation hearing herein, he had a conversation with Scott Hagar, the senior manager for the Hartford facility. It came about because, while at the facility, he observed that Chiappa, who was the contractor who had contracted with the Employer, had a mailbox at the facility (which was appropriate), but that Dizinno, who was the contractor retained driver who was retained by Chiappa to assist him with his routes, also had his own mailbox with his name on it (which Durette testified was not appropriate), and he told Hagar that names on the mailboxes needed to be corrected to reflect the contractor's name only, whether an individual or a corporation. When Durette next visited the facility he observed that Dizinno's name was no longer on the mailbox. He testified that during his employment with the Employer, a contractor retained driver was never allowed to have his name on a mailbox at the facility where he/she was employed. Durette further testified that senior managers or contractor relations managers sometimes have "business discussions" with the contractors to discuss their operation, either positive or negative, or to discuss concerns about their operation. At the same time that he told Hagar about the mailboxes, he also told him that these business discussions are to be between him and the contractor, not the contractor retained driver. He spoke to Hagar about this because he learned that Hagar had a business discussion with Dizinno.

Finch, also testified that only contractors are allowed to have mailboxes at the Employer's facilities; contractor retained drivers are not permitted their own mailboxes and to his knowledge, none have had mailboxes of their own. He further testified that the terminal managers would generally have business discussions only with the contractor. However, daily package coordination issues do not rise to the level of business discussions and in those situations the terminal manager could have discussions with the driver. The Employer introduced into evidence two Contract Discussion Notes dated March 28 and March 29 between Hagar and Chiappa. In each, Hagar complained to Chiappa that there were DNAs (apparently, a failure to deliver) on Dizinno's route on the prior day and Chiappa responded that he had no idea what happened. Hagar told Chiappa that it looks bad for the Employer when that occurs and that Chiappa was responsible for correcting it.

In its remand of Objection No. 2, the Board stated:

> Absent evidence about the alleged pre-election change in the job circumstances for Chiappa and Dizinno, we cannot determine whether the opening of the ballots improperly affected the election results…it was error for the judge to preclude litigation of this changed-circumstances issue and then to find that the Employer failed to meet its burden.

The party seeking to exclude an employee from the unit, in this case the Employer, bears the burden of proving that the employee(s) should not be permitted to vote. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Nurses United for Improved Patient Healthcare*, 338 NLRB 837 (2003). It follows that it is the Employer's burden to establish that changed circumstances in the employees' jobs from the hearing to the date of the election support its argument that they should no longer be included in the unit. The sole evidence produced by the Employer to support this burden was the testimony of Durette and Finch that in early February 2007, they told Hagar that only direct employees such as Chiappa, could have their names on mailboxes at the facility, and that since Dizinno was a contractor retained driver, he could not have his name on a mailbox, and Hagar complied with this order. They also told

Hagar that major business discussions should only be between the supervisor and the directly employed driver, not with contractor retained drivers.

In order to determine whether the Employer has satisfied its burden of a sufficient change in job circumstances of Chiappa and Dizinno so that they should be excluded from the unit, thereby making the commingling of their ballots objectionable conduct, it is necessary to determine the basis of the Regional Director's DDE to determine why he included Chiappa and Dizinno in the unit. As regards Chiappa, although the DDE excludes multiple route contract drivers, and Chiappa executed an agreement covering Dizinno's Manchester route, he was included in the unit, apparently because it was found that he was not a traditional multi route contract driver. Rather, he agreed to the second route because Dizinno, a friend of his, was about to be hired by the Employer as a contract driver, but was unable to purchase a delivery vehicle because of poor credit. At the suggestion of the terminal's manager, and "as a favor to the Employer" Chiappa executed the agreement allowing Dizinno to cover what became his Manchester route. There was a further understanding "that any supervisory issues that arose would be strictly between Rogers [the manager of the facility] and Dizinno." The only further discussion of Chiappa in the DDE, is the finding that there is no evidence that he possessed or exercised any supervisory authority toward Dizinno and therefore the Employer had failed to satisfy its burden of establishing that he was a supervisor within the meaning of Section 2(11) of the Act, and he was therefore included in the unit. As the Employer has established no change in circumstances to Chiappa's job responsibilities, I find that it remains the same, and that he was, and is, an eligible voter.

As regards Dizinno, the Employer alleges that the testimony of Durette and Finch regarding removing Dizinno's name from his mailbox and that business discussions should be with Chiappa, rather than Dizinno, represent a sufficient change of circumstances to remove Dizinno from the unit. Like the situation with Chiappa, this determination demands a close reading of the DDE to determine why Dizinno was included in the unit. The Employer, in his brief, alleges that Dizinno was included in the unit because at one point prior to the election, his name was on a mailbox at the facility, and also prior to the election, the Employer had business discussions with him, rather than Chiappa, about delivery problems on his route. As stated by counsel for the Employer, the DDE discusses the mailbox and business discussions under the classification: "Supervisory Status of Paul Chiappa and Unit Status of Robert Dizinno." The concluding paragraph of this subject states:

> Beyond the dynamics of the business relationship between Chiappa and Dizinno, it appears that the Employer treats Dizinno as a contract driver in his own right. In this regard, unlike its treatment of other drivers hired by and working for contract drivers, the Employer conducts all discussions regarding the Manchester route directly with Dizinno, not with Chiappa. Such discussions include customer service issues and the amounts that are due to temporary and supplemental drivers used by Dizinno for the Manchester route during the peak season. In addition, at its Hartford Terminal, the Employer maintains mailboxes for all it contract drivers, but not for other drivers, so that contract drivers can receive direct Employer communications regarding a number of route-related matters. From November 2004 through February 2007, the Employer maintained separate mailboxes for Chiappa and Dizinno. On February 27, 2007, the second day of the hearing in the instant matter, Dizinno's name was removed from his mailbox without explanation.

The Employer argues that these two factors relied upon by the Regional Director have been nullified by the March 28 and March 29, 2007 Contract Discussion Notes and by the removal of Dizinno's name from his mailbox, as directed by Durette and Finch. Counsel for the

Petitioner counters that, as stated in the DDE, his name was removed from the mailbox during the hearing, and the Contract Discussion Notes introduced by the Employer are neutralized by a similar note from Hagar to Chiappa, dated December 22, 2006, complaining about some packages that Dizinno apparently did not deliver on his route. In addition, Finch testified that on some less important issues, such as daily package coordination, the terminal manager could have discussions directly with the driver.

The ultimate question is whether the Employer has satisfied its burden that the changed circumstances have been sufficient to now exclude Dizinno from the unit. Reluctantly[1] I find that the Employer has sustained that burden as to Dizinno. The sole basis in the DDE for finding that Dizinno should be included in the unit was the mailbox and discussions issue, and the credible testimony of Durette and Finch establishes that those factors have changed since the hearing. I therefore find that the evidence establishes that since the hearing, Dizinno's situation has changed sufficiently to make him an ineligible employee, and the Board agent should not have opened, commingled and counted his ballot.

Conclusions

Based upon the above, I find that it was error for the Board agent to open, count and commingle Dizinno's ballot with the other ballots, despite the Employer's continuing challenge to Dizinno's ballot. However, I have also found that changed circumstances did not affect Chiappa's inclusion in the unit and while it would have been more appropriate not to open, commingle and count his ballot, it was harmless error to do so. Because the vote was 12 for the Petitioner and 9 against the Petitioner, with 2 other challenged ballots, I cannot determine whether the Board agent's error in opening, commingling and counting Dizinno's ballot affected the election. I recommend that the Regional Director determine the eligibility of the remaining two challenged ballots. If one or both of them are found to be eligible, their ballot(s) should be opened and counted. On the other hand, if neither of them are found to be eligible then the three vote difference establishes that the error regarding Dizinno's vote could not have affected the result of the election.[2]

Dated, Washington, D.C. May 22, 2009

Joel P. Biblowitz
Administrative Law Judge

[1] I say reluctantly because the election took place two years ago.

[2] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Boad in Washington by June 2, 2009.